IN THE

Supreme Court of Virginia

RECORD NO. 071959

ROBERT G. MARSHALL, et al.

Appellants,

v.

NORTHERN VIRGINIA TRANSPORTATION AUTHORITY,

Appellee.

BRIEF OF APPELLEE NORTHERN VIRGINIA TRANSPORTATION AUTHORITY

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Appellee, the Northern Virginia Transportation Authority ("NVTA"), by counsel, submits this brief in opposition to the brief submitted by Robert G. Marshall and others (collectively referred to as the "Marshall appellants"). For the reasons stated below, NVTA submits that the judgment of the trial court was correct and should be affirmed.

STATEMENT OF THE NATURE OF THE CASE AND MATERIAL TRIAL COURT PROCEEDINGS

-A-
Statement of the Nature of the Case

Chapter 896, 2007 Va. Acts of Assembly (hereinafter "Chapter 896" or the "Act") is the first major transportation funding and reform legislation passed by the General Assembly in over two decades. J.A. 973-1013. The Generally Assembly adopted it by an overwhelming majority vote. *See* http://leg1.state.va.us/cgi- bin/legp504.exe?ses= 071&typ=bil&val=hb3202 (House, 85-15; Senate, 29-10). Among other things in Chapter 896, the General Assembly prescribed seven new regional taxes and fees ("Regional Taxes and Fees") and authorized NVTA, a political subdivision of the Commonwealth, to impose them. For each tax and fee, the General Assembly specified the subject of taxation, fixed the amount, and specified the purposes for which such revenue may be spent. It authorized NVTA, whose Board includes an elected official from each of NVTA's member localities, to impose each of the Regional Taxes and Fees.

On July 12, 2007, NVTA's Board held a public hearing and authorized the proposed issuance of its Virginia Transportation Authority Transportation Facilities Revenue Bonds, in an amount not to exceed $130,000,000 (the "Bonds"). NVTA also authorized the imposition of each of the Regional Taxes and Fees to pay the Bonds, and the filing of this proceeding to validate the Bonds, the Regional Taxes and Fees and the related NVTA actions.

-B-

Material Trial Court Proceedings

On July 13, NVTA filed this bond validation proceeding in the Circuit Court of Arlington County, pursuant to the Public Finance Act of 1991 (the "Public Finance Act"), Va. Code §§ 15.2-2600, *et seq.*, and the Northern Virginia Transportation Authority Act (the "NVTA Act"), Va. Code §§ 15.2-4829, *et seq.* NVTA requested, among other things, that the Circuit Court validate NVTA's proposed Bonds and the imposition of the Regional Taxes and Fees.

The Governor, the Attorney General, and the Speaker of the House of Delegates (collectively "the Commonwealth") intervened in the case as plaintiffs in support of NVTA. Two *amicus* briefs were also filed in support of NVTA's bond validation, including one by the Northern Virginia Transportation Alliance ("the Alliance"), which is a non-partisan group composed of numerous citizens and businesses that seek to advance better regional transportation solutions for Northern Virginia. The Hampton Roads Transportation Authority, a new political subdivision created by the General Assembly in Chapter 896 to undertake transportation responsibilities similar to NVTA in Tidewater Virginia localities, submitted the other *amicus* brief.

The County of Loudoun ("Loudoun County" or "Loudoun") filed responsive pleadings as a defendant opposing the validation. In addition, the Marshall appellants responded as defendants opposing the validation and filed an answer and counterclaim alleging, in part, that the Act, or portions of it, violate the Constitution of Virginia.

On August 27, 2007, the trial court conducted a hearing in which it denied the Marshall appellants' motion for summary judgment, J.A. 711, received certain exhibits into evidence offered by NVTA, and heard extensive arguments on the merits. The defendants introduced no evidence. The following day, the Court issued its opinion from the bench granting NVTA's

request for declaratory and injunctive relief as to all claims and denying the defendants' claims and requests for relief. J.A. 945-46. The Court entered its Final Order on August 31, 2007.

QUESTIONS PRESENTED

1. Did the trial court err in holding that the General Assembly has the power to prescribe the Regional Taxes and Fees and to authorize a special unit of government to impose them where the Constitution does not constrain or prohibit such action?

2. Did the trial court err when it followed this Court's precedent in *Dykes v. Northern Virginia Transportation District Comm'n*, 242 Va. 357, 370, 411 S.E.2d 1 (1991) (opinion on rehearing beginning at 242 Va. 370, 411 S.E.2d 8 (Nov. 8, 1991)), and held that NVTA's proposed Bond issue does not create constitutional debt requiring a referendum?

3. Did the trial court err in holding that Va. Code § 8.3A-104, a part of the Uniform Commercial Code ("UCC"), does not apply to the Bond issue where (1) the Marshall appellants did not raise the issue in their initial pleadings; (2) the NVTA Act expressly states that the Bonds are negotiable instruments; and (3) government bonds payable from a particular source or proceeds are not deemed conditional under the UCC?

4. Did the trial court err in holding that Chapter 896 meets the "one-object" requirement of Article IV, Section 12 when Chapter 896's title gave notice that the subject of the enactment is transportation and the subjects embraced in the statute are congruous and have a natural connection with, or are germane to, transportation?

STATEMENT OF FACTS

-A-
Northern Virginia's Transportation Crisis

Northern Virginia and the Washington, D.C., metropolitan area have the nation's third-highest rate of traffic congestion. J.A. 1111-17. Northern Virginia accounts for 21 percent of the daily vehicle miles traveled ("VMT") for the entire Commonwealth while having only 8 percent of its roadway lane miles. J.A. 953; J.A. 1144-45.

This congestion impedes the quality of life and general well-being of the citizens and thwarts the day-to-day commerce of Northern Virginia's businesses. *See* J.A. 1111-17; J.A. 600-15, 618; J.A. 953. It endangers public health and safety by causing a disproportionate number of vehicle crashes, escalating air pollutants, and slowing emergency medical, fire, and police responders. J.A. 1148, 1152, 1160; J.A. 601-02. In 2006 alone, 32,604 of the Commonwealth's 97,093 automobile accidents occurred in just four of Northern Virginia's localities, which are Member Localities of NVTA. J.A. 1126-29.

Traffic congestion is no longer a manifestation of "rush hour" along major thoroughfares. Instead, it affects the entire transportation system, spreading to neighborhood streets and transit systems throughout the day. *See* J.A. 1148, 1151, 1152, 1153-54; J.A. 1204. One study estimated that area residents wasted 145,484,000 travel hours in 2003. J.A. 1134.

Within the next 25 years, nearly one million new residents are expected to move to Northern Virginia, J.A. 953, exacerbating conditions already rated third worst in the nation.

-B-
Chapter 896

Chapter 896's title states that the Act will amend and reenact numerous provisions of the Code with all such enactments "relating to transportation." J.A. 973. As enacted, Chapter 896

comprises a three-pronged approach to relieving transportation problems, including (1) a statewide and regional funding component to finance needed transportation projects, (2) a Virginia Department of Transportation reform component to streamline VDOT operations and improve legislative oversight, and (3) a local land-use component intended to reduce the impact of development on transportation by minimizing sprawl and encouraging the use of impact fees on developers. J.A. 1017. Each component of Chapter 896 is consistent with recognized legislative strategies relating to transportation improvements, which include funding for the addition of more capacity for highway, transit and railroads, adopting regional solutions to address congestion problems, and utilizing land use controls designed to reduce demand for daily travel. J.A. 1112; J.A. 1122-23; J.A. 1150; J.A. 1176; J.A. 1180-92; J.A. 1202; J.A. 1204; J.A. 1221. The defendants did not introduce contrary evidence.

In describing the legislation, the Speaker of the House of Delegates, William J. Howell, stated that the bill

> reforms, improves and invests in Virginia transportation an[d] the future prosperity of our Commonwealth. It empowers regions and localities in the most gridlocked areas of the state to enhance their quality of life.

J.A. 1014.

-C-
NVTA

The General Assembly created NVTA in 2002 as a political subdivision. It embraces the Counties of Arlington, Fairfax, Loudoun, and Prince William, and the Cities of Alexandria, Fairfax, Falls Church, Manassas, and Manassas Park (collectively, the "Member Localities"). Va. Code § 15.2-4831. Its Board consists of fourteen (14) voting members, of which twelve (12) are elected by the people directly to a legislative office, with the other two being appointed by

the Governor. The elected members of the Board include the mayor of each member city and the chairman of the board of supervisors of each member county, two members of the House of Delegates, appointed by the Speaker, and one member of the Senate, all residing in localities embraced by NVTA. Va. Code § 15.2-4832. Decisions of NVTA must be approved by a supermajority of the voting members.[1] Va. Code § 15.2-4834.

NVTA's powers are limited by its enabling legislation to activities pertaining to regional transportation. It is empowered, among other things, to prepare a regional transportation plan for Northern Virginia and to construct or acquire the transportation facilities either specified in the plan or constituting a regional priority. *See* Va. Code §§ 15.2-4830, 4840(5). NVTA may issue bonds to finance such projects. Va. Code §§ 15.2-4839, -4519. Pursuant to Chapter 896, NVTA may impose the seven Regional Taxes and Fees designated by the General Assembly for the sole purpose of paying the bonds and providing revenue for other transportation purposes. Va. Code § 15.2-4838.1.

On September 14, 2006, NVTA approved a comprehensive regional transportation plan for Planning District Eight, which is comprised of the Member Localities, entitled "TransAction 2030 Regional Transportation Plan" (the "Plan"). J.A. 967. The Plan recognizes that Northern Virginia needs $46.6 billion for roads and transit by 2030 in order to improve traffic conditions. J.A. 963. Each of NVTA's Member Localities endorsed the Plan. NVTA Ex. 7 (*see* entire section beginning at vii).

[1] Va. Code § 15.2-4834 provides, *inter alia*, that (i) a majority of NVTA, which majority shall include at least a majority of the representatives of the Member Localities, shall constitute a quorum; (ii) decisions of NVTA shall require a quorum and shall be in accordance with voting procedures established by NVTA; and (iii) in all cases, decisions of NVTA shall require the affirmative vote of at least two-thirds of the members of NVTA present and voting, and two-thirds of the representatives of the Member Localities who are present and voting and whose Member Localities include at least two-thirds of the population embraced by NVTA.

-D-
NVTA Is A Special Unit Of Government

NVTA is not a regional government as defined in Article VII, Section 1 of the Constitution but, rather, is a separate, special unit of government akin to numerous other special purpose districts and authorities in Virginia. *See, e.g.*, Va. Code § 5.1-153 (Metropolitan Washington Airports Authority); § 15.2-4903(A) (industrial development authorities); § 15.2-5302 (hospital authorities); § 15.2-5102 (water and waste authorities); § 21-113 (sanitary districts); Va. Code § 36-4 (local redevelopment and housing authorities); 1980 Va. Acts of Assembly, ch. 380 (Richmond Capital Region Airport Commission).

-E-
NVTA's Public Hearing and Imposition of Regional Taxes and Fees

NVTA held a public hearing on July 12, 2007, at which over fifty (50) speakers addressed the proposed imposition of the Regional Taxes and Fees and issuance of the Bonds. A substantial majority of the speakers voiced support for imposition of the Regional Taxes and Fees.[2] These speakers made it clear that daily congestion on the roadways in Northern Virginia is not just a matter of rush hour delays but creates an overriding impediment to people trying to live their daily lives and manage their businesses. Speakers owning businesses advised NVTA that the traffic problem in Northern Virginia causes lost productivity and increases the struggle for profitability. *See* J.A. 609-10, 616.

For example, the President of the Northern Virginia Technology Council, comprising 1,100 companies, advised that "[n]o issue impacts northern Virginia's technology community companies, executives, employees, clients, and customers as strongly and acutely as northern

[2] A transcript of the July 12, 2007 Meeting was lodged with the trial court and is part of the trial record.

Virginia's transportation crisis." J.A. 605-06. A real estate broker advised NVTA that her fuel costs are twice what they would be in less congested areas, estimating that she wastes an entire tank of fuel each week idling in traffic. J.A. 600-01. Service providers need to hire more people and purchase new vehicles because they cannot be sure that their workers will get to a job site on time. *See* NVTA July 12, 2007 Hr'g Tr. 101-02, 104. Others advised of the hidden tax on people's lives caused by traffic congestion which manifests itself in lost personal and family time, lost time at work, stress on a daily basis, and higher fuel costs. *See* J.A. 600-01, 607, 608, 611, 615, 617, 618-19. One resident of Fairfax, who has lived in the County for 50 years, said he has witnessed the "deterioration of a system that during that period has gone from the benchmark for every other state and the envy of all, into one that I can only classify as an embarrassment and costly in movement of people and goods." NVTA July 12, 2007 Hr'g Tr. 44-45.

Following the public hearing, NVTA adopted resolutions imposing the seven Regional Taxes and Fees effective January 1, 2008 (the "Imposition Resolutions"). J.A. 10 to 38. In addition, NVTA unanimously adopted a Bond Resolution. J.A. 39. In the Bond Resolution, NVTA found and determined, among other things, that the issuance of the Bonds will be for the benefit of the inhabitants of the Commonwealth and the Member Localities and promote their safety, health, welfare, convenience and prosperity. *Id.* at 39-46. NVTA also determined that the Bonds will further the purposes of NVTA and the NVTA Act by, among other things, financing the construction and acquisition of transportation projects identified in, or consistent with, the approved regional transportation plan. *See id.*

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NVTA's Bonds Will Not Be Obligations of the Commonwealth

The Bonds, when issued, will be payable only from the Pledgeable NVTA Revenues pledged for such purpose under the Bond Resolution and the Indenture. The Bonds, the Bond

Resolution, and the NVTA Act specify that the Bonds shall not be a debt, liability or obligation of the Commonwealth or any political subdivision thereof, other than NVTA. Va. Code §§ 15.2-4839, -4519(A)(2); J.A. 43; J.A. 66.

The Bond Resolution expressly acknowledges that the General Assembly may, at any time, eliminate, change or limit NVTA's authority to impose the Regional Taxes and Fees and that NVTA will not pledge, covenant or agree to impose or maintain at any particular rate or level any of the Regional Taxes and Fees. J.A. 39-46.

SUMMARY OF ARGUMENT

Recognizing that Virginia faces a transportation crisis in Northern Virginia, a bipartisan coalition of members of the General Assembly prescribed seven new Regional Taxes and Fees and authorized a special unit of government to impose them. In Chapter 896, the General Assembly did not unlawfully delegate legislative power because the General Assembly itself specified the subject of the Regional Taxes and Fees, dictated the tax rates, and specified how NVTA may spend the revenue. The General Assembly maintains ultimate supervisory control over them and is free to amend or restrict NVTA's power to impose them just as it maintains ultimate supervisory control over NVTA. The Virginia Constitution does not prohibit this procedure.

While the Marshall appellants fret that Chapter 896 assigns powers to "unelected" bodies, Chapter 896 is entirely consistent with Virginia's historical practice of employing special units of government, such as special districts and authorities, to impose taxes and fees and issue debt in the course of undertaking important public functions, including construction and maintenance of public facilities. *See, e.g.*, A. E. Dick Howard, *Commentaries on the Constitution of Virginia* 783, 798-800 (University Press of Virginia 1974) (hereinafter "Howard").

In no way does this procedure undermine political accountability. The Virginia Constitution provides for the election and removal of state delegates and senators by way of regularly held elections, and the electorate's ability to express its assent or disapproval for the Regional Taxes and Fees, by voting to retain or remove representatives responsible for adopting them, accords with the tradition of accountability to the electorate. NVTA itself is also politically accountable, because twelve of the fourteen voting members are all appointed from the ranks of elected officers residing in the region and each is answerable to his or her own local constituents. In any event, the United States Supreme Court has repeatedly rejected the contention that taxes can be imposed only by bodies that have been elected to their posts by those being taxed. *See Heald v. District of Columbia*, 259 U.S. 114 (1922) (Brandeis, J.) (approving federal government's taxation of persons residing in the District of Columbia); *Thomas v. Gay*, 169 U.S. 264, 276-77 (1898) (approving Oklahoma's personal property tax imposed on non-residents); *Loughborough v. Blake*, 18 U.S. (5 Wheat) 317 (1820) (Marshall, C.J.) (Congress has power to lay and collect taxes within the District of Columbia). This determination is particularly significant in light of the fact that Congress' powers are limited by the delegated powers and specified authority expressed in the federal Constitution, whereas the General Assembly's powers are plenary under the Virginia Constitution. Va. Const. art. IV, § 14 ("authority of the General Assembly shall extend to all subjects of legislation not herein forbidden or restricted").

With respect to the Marshall appellants' claim that NVTA's proposed bond issue creates debt requiring a referendum, NVTA is an independent political subdivision and its enabling legislation provides that debt incurred through its Bonds is that of the entity, not of the Commonwealth or of any other political subdivision. Va. Code §§ 15.2-4839, 15.2-4519(A)(2).

Chapter 896 simply does not authorize the creation of debt of the Commonwealth in contravention of the proscription of Article X, Section 9 of the Constitution; nor does it create debt of a county in violation of Article VII, Section 10. Moreover, this Court has held in *Dykes v. Northern Virginia Transportation District Commission*, 242 Va. 357, 411 S.E.2d 1 (1991) (opinion on rehearing beginning at 242 Va. 370, 411 S.E.2d 8 (Nov. 8, 1991)), that independent political subdivisions may issue bonds without holding a referendum and that does not violate the constitutional limitations.

Contrary to the Marshall appellants' claims relative to the Bonds being negotiable instruments, the Bonds, which will be secured by a pledge of particular revenue, are deemed by statute to be negotiable instruments. This Court has long recognized and approved financing methods substantially the same as the one proposed by NVTA under which a legislative body "is not legally obligated to make the appropriation" to support bond payments. *Dykes*, 242 Va. at 374, 411 S.E.2d at 10. Appellants' attempt to reopen *Dykes* should be denied as their claims do not pertain to the validity of NVTA's proposed bond issuance and are inconsistent with established Virginia law and practice relating to the issuance and marketing of bonds.

As to the Marshall appellants' argument that Chapter 896 violates the requirements of Section 12 of Article IV of the Constitution, that section provides in pertinent part that "[n]o law shall embrace more than one object, which shall be expressed in its title." That section does not require that the title shall list each section addressed by a bill introduced into the General Assembly, and the failure of the title to reference each section of the Code of Virginia to be amended or affected by the bill does not invalidate the bill. *E.g., Southern Ry. v. Russell*, 133 Va. 292, 298, 112 S.E. 700, 702 (1922). As described by Professor Howard, "the title of an act may be general and cover seemingly diverse points if it gives notice of the general subject and

interest likely to be affected." Howard at 529 (footnote omitted). Here, the title gave notice that the subject was transportation.

With respect to the one object requirement, this Court has stated:

> All that is required . . . is that the subjects embraced in the statute, but not specified in the title, are congruous, and have natural connection with, or are germane to, the subject expressed in the title.

Commonwealth v. Brown, 91 Va. 762, 772, 21 S.E. 357, 360 (1895). Here, all portions of Chapter 896 are congruous and have a natural connection with or are germane to the subject of transportation. *See Town of Narrows v. Bd. of Supervisors of Giles County*, 128 Va. 572, 105 S.E. 82 (1920) (enactment providing for construction, maintenance, and repair of streets, raising revenue, including establishment of toll gates and collection of tolls related to incorporation of town); *Wilburn v. Raines*, 111 Va. 334, 68 S.E. 993 (1910) (road law for establishing and maintaining roads and bridges and for other purposes).

Analysis of the constitutionality of Chapter 896 must begin with this Court's strong presumption that the General Assembly's statutes are constitutional. *Coleman v. Pross*, 219 Va. 143, 153, 246 S.E.2d 613, 619 (1978). Legislation cannot be declared unconstitutional unless it "clearly" and plainly violates the Constitution in such manner as to leave no doubt or hesitation. *Reed v. Union Bank of Winchester*, 70 Va. (29 Gratt.) 719, 722 (1878). "[E]very reasonable doubt must be resolved in favor of the act's constitutionality." *Terry v. Mazur*, 234 Va. 442, 449, 362 S.E.2d 904, 908 (1987) (citing *Almond v. Gilmer*, 188 Va. 822, 834, 51 S.E.2d 272, 276 (1949)). Indeed, "[t]o doubt is to affirm." *Peery v. Virginia Bd. of Funeral Dirs. & Embalmers*, 203 Va. 161, 165, 123 S.E.2d 94, 97 (1961) (quotations and citations omitted). "The courts will declare the legislative judgment null and void only when the statute is plainly repugnant to some

provision of the state or federal constitution." *Blue Cross of Va. v. Commonwealth*, 221 Va. 349, 358, 269 S.E.2d 827, 832 (1980).

As discussed below, application of these settled principles establishes that the Constitution does not restrict or limit the General Assembly's power to enact those provisions of Chapter 896 at issue in this appeal.

ARGUMENT

A. The Constitution Does Not Constrain the General Assembly's Authorization of the Regional Taxes and Fees.

When addressing the power of the General Assembly to establish the Regional Taxes and Fees under Chapter 896 and its authorization of a political subdivision to impose them, the appropriate starting place is the first paragraph of Article IV, Section 14, which provides:

> The authority of the General Assembly shall extend to all subjects of legislation not herein forbidden or restricted; and a specific grant of authority in this Constitution upon a subject shall not work a restriction of its authority upon the same or any other subject. The omission in this Constitution of specific grants of authority heretofore conferred shall not be construed to deprive the General Assembly of such authority, or to indicate a change of policy in reference thereto, unless such purpose plainly appear.

Va. Const. art. IV, § 14. In contrast to the federal Constitution, which is one of delegated powers and specified authority, the Constitution of Virginia does not grant power to the General Assembly; rather, as it relates to the General Assembly, it only restricts powers "otherwise practically unlimited." *Lewis Trucking Corp. v. Commonwealth*, 207 Va. 23, 29, 147 S.E.2d 747, 751 (1966). *See Terry v. Mazur*, 234 Va. 442, 449, 362 S.E.2d 904, 908 (1987).[3]

In the absence of an express prohibition forbidding the Regional Taxes and Fees adopted by the General Assembly, the Marshall appellants attempt to read into the Constitution an

[3] As discussed *infra*, p. 22, Section 3 of Article VII, which addresses "other unit[s] of government," provides further acknowledgment of the General Assembly's unlimited power in this regard.

unstated, implied ban on delegations of taxation powers. Marshall Br. 8-15.[4] Virginia law does not support the Marshall appellants' argument.

First, the Regional Taxes and Fees are not a true delegation because the General Assembly itself specified the subject of the seven Regional Taxes and Fees, dictated the tax rates, and specified how the revenue derived would be spent. Va. Code § 46.2-755.1 (non-refundable annual license fee of $10 for each vehicle registered in the Member Localities); § 46.2-755.2 (non-refundable initial, one-time registration fee on vehicles in Member Localities imposed at a rated of 1% of the value of the vehicle at the time the vehicle is first registered); § 46.2-1167.1 (inspection fee of $10 for vehicles); § 58.1-605(K) (retail sales tax of 5% on charges for labor or services on motor vehicle repair); § 58.1-606(H) (retail sales tax of 5% on charges for labor or services on motor vehicle repair); § 58.1-802.1 (regional congestion relief fee on each deed at a rate of $0.40 for each $100 of value of the interest); § 58.1-2402.1 (additional rental fee of 2% of gross proceeds of the daily rental charge); § 58.1-3825.1 (transient occupancy tax of 2% of the amount of the charge for the room occupied). *See* Va. Code § 15.2-4838.1 (how revenues derived from the each tax and fee may be spent).[5]

The General Assembly has opened to NVTA a very narrow window to impose and collect the Regional Taxes and Fees. It has specified that purpose for which the revenue from them must be used. Va. Code § 15.2-4838.1(A). Moreover, the General Assembly retains

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[4] Contrary to the Marshall appellants' claim on page 6 of their brief, this case has nothing to do with a delegation of legislative power to a private entity.

[5] Forty percent of the revenues raised by the Regional Taxes and Fees shall be distributed directly by NVTA to the localities on a pro rata basis with each locality receiving a share of the funds based on the amounts originating there. Va. Code § 15.2-4838.1. Of that amount, a portion of such funds will be spent on urban and secondary roads and the remainder on additional road construction, for other transportation capital improvement or for public transportation at the locality's discretion. *Id.* The remaining sixty percent of the NVTA revenues must be used by NVTA solely for transportation projects and purposes benefiting the Member Localities. Revenues must be used for debt service on bonds, capital improvements for the Washington Metropolitan Area Transit Authority, capital improvements and operational expenses for the Virginia Railway Express, and for roads and transit purposes. *Id.* In the absence of a constitutional restriction, the General Assembly may confer such power to its political subdivisions.

authority and control over the Regional Taxes and Fees. It is free to amend, repeal, or restrict NVTA's power to impose them. J.A. 10-38. Thus, to the extent that the term "legislative power," as used in the Constitution, means the "power to make laws," Black's Law Dictionary 919 (8th ed. 2004); *see Whitehead v. H&C Development Corp.*, 204 Va. 144, 150, 129 S.E.2d 691, 695 (1963), the General Assembly made the law under Chapter 896 and did not delegate that function to NVTA.

Second, even if NVTA's authorization under Chapter 896 could be characterized as a delegation, this Court has long recognized that the "legislature may delegate its power to political subdivisions, governmental bodies, and certain regulated private entities exercising functions charged with the public interest." *Hamer v. School Bd. of Chesapeake*, 240 Va. 66, 70, 393 S.E.2d 623, 626 (1990). Such a delegation is valid when the legislature creates safeguards to control arbitrary administrative action such as specific policies and standards to guide the official, agency, or board in the exercise of such power. *E.g.*, *Ames v. Painter*, 239 Va. 343, 349, 389 S.E.2d 702, 705 (1990); *Chapel v. Commonwealth*, 197 Va. 406, 89 S.E.2d 337 (1955). For example, in *Chapel*, this Court invalidated the Dry Cleaners Act because it delegated to a state board the power to promulgate rules and regulations controlling dry cleaning businesses, without fixing any standard to guide and control the Board's exercise of its discretion. As stated by Mr. Howard,

> invariably [the Court] is forced to recognize that a certain amount of delegation is essential to the efficient administration of the government. The dilemma is usually solved by stating that the delegation is valid if the Legislature declares the policy of the law and prescribes the controlling legal principle, leaving to the agency the task of applying the Legislature's guiding standards.

Howard at 469 (footnotes omitted).

In the present case, the General Assembly has prescribed a policy and controlling standards for NVTA to impose the Regional Taxes and Fees. The General Assembly, itself, established each tax or fee, specified the subject of each, fixed the tax rates, and directed the use of the revenues.

The General Assembly's use of NVTA to fulfill a specific public function has a historical basis in Virginia. Special units of government, such as authorities, have been utilized extensively in Virginia since the 1600s for numerous public functions, including construction and maintenance of roads, erection of bridges, and caring for the poor. *See generally* S.J. Makielski, Jr. & David G. Temple, *Special District Government in Virginia* (University Printing Office 1967); Albert O. Porter, *County Government in Virginia: A Legislative History, 1607-1904*, 39-40 (1947). Traditionally, such entities do not have the same constitutional limitations imposed upon them as customary state and local governments. Makielski & Temple at 23; S.J. Makielski, Jr., *The Special District Problem in Virginia*, 55 Va. L. Rev. 1182, 1187 (1969).

There were in excess of two hundred special districts utilized in Virginia in 1970 when the present Constitution was adopted. Secretary of the Commonwealth, Report to the Governor and General Assembly of Virginia, 84-129 (1968-69). The omission of provisions addressing special districts and authorities in the present Constitution was not by accident, however. In fact, the Commission on Constitutional Revision made a "thorough study of local authorities in Virginia" but did "not recommend a constitutional provision dealing specially with authorities." Report of the Commission on Constitutional Revision 227 (Jan. 1, 1969) (hereinafter "CCR"). Plainly, the framers intended that special districts and authorities continue to fill their special functions.

The governmental functions exercised by such entities include imposition of taxes as well as the exercise of the police power[6] and the taking of private property through eminent domain.[7] As an example, Virginia's Sanitary District Law, first enacted in 1926, authorizes sanitary districts to levy taxes and service charges in order to raise revenue to construct and operate water and sewer systems, sidewalks, street lighting, and fire-fighting systems. Va. Code § 21-118. Here, Chapter 896's authorization is more limited than the sanitary districts' power, because, unlike a sanitary district, the General Assembly did not give NVTA any discretion in choosing the subjects or rates of taxation.[8]

The General Assembly's ability to confer governmental powers upon political subdivisions is further supported by this Court's cases. *See, e.g.*, *City of Danville v. Hatcher*, 101 Va. 523, 530, 44 S.E. 723, 726 (1903) ("[i]n the absence of constitutional restrictions, it is competent for the Legislature to confer its police power upon municipal corporations in such measure as it deems expedient"); *Hamer v. School Bd. of Chesapeake*, 240 Va. 66, 70, 393 S.E.2d 623, 626 (1990) (eminent domain may be delegated); *Dykes*, 242 Va. at 370, 411 S.E.2d at 8 (authorization to issue bonds and utilize proceeds). Just as the sovereign police power, the power to take property by eminent domain, and the power to issue bonds and use the proceeds to

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[6] *See, e.g.*, Va. Code § 62.1-132.11 (Virginia Port Authority empowered to adopt and enforce reasonable rules and regulations relating to the safety and security of the authority's property which have "the force and effect of law"); Va. Code § 15.2-5114(2) (Virginia water and waste authorities empowered to adopt "rules and regulations, not inconsistent with [the] chapter or the general laws of the Commonwealth, for the regulation of its affairs and the conduct of its business and to carry into effect its powers and purposes"); and Va. Code §§ 5.1-153, 5.1-157 (Metropolitan Washington Airports Authority).

[7] *See, e.g.*, Va. Code §§ 62.1-128, 62.1-132.3, 62.1-136 (Virginia Port Authority may condemn in order to stimulate the commerce of the ports of the Commonwealth); Va. Code § 15.2-5114 (water and waste authorities may condemn properties to construct water and wastewater facilities); Va. Code §§ 5.1-2.2:1, 5.1-2.5 (Virginia Aviation Commission); and Va. Code §§ 21-113, 21-118 (sanitary districts).

[8] As explained *infra*, p. 22, the members of the governing body of a sanitary district are not elected directly by the residents of the district to serve on the governing body of the district.

construct public works may be conferred by the General Assembly to special purpose authorities, so too may such an entity impose taxes prescribed by the General Assembly.

In restricting the power of the General Assembly to act, including authorizing political subdivisions to act, the Constitution does not provide any basis for distinguishing the power to tax from the exercise of other governmental powers. For example, the fourth paragraph of Article IV, Section 11, treats equally General Assembly bills creating a new office, creating a debt, making an appropriation or imposing a tax. Article IV, Section 14 concerning local, special or private laws treats taxes with equal dignity to many other governmental acts. Article VII, Section 7 treats appropriating, taxing and borrowing the same. Accordingly, the Marshall appellants' argument that the taxing power is "significantly different" and "occupies a special place," Marshall Br. 9-10, must be rejected.

The Marshall appellants' non-delegation arguments are based chiefly on inapplicable zoning cases – *Krisnathevin v. Board of Zoning Appeals*, 243 Va. 251, 414 S.E.2d 595 (1992), and *County of Fairfax v. Fleet Industrial Park Ltd. Partnership,* 242 Va. 426, 410 S.E.2d 669 (1991). Marshall Br. 8, 10. In *Krisnathevin*, this Court held that zoning was a legislative function which could not be delegated to an individual county employee. In *Fleet Industrial*, the Court invalidated a statute providing an advisory commission, one half of whose members were privately selected, and not the County, with final veto power to determine zoning classifications as well as ordinance text and regulations over certain property, and rendered the County powerless to enact zoning changes without consent of affected landowners. *Fleet Industrial*, 242 Va. at 432, 410 S.E.2d at 673. In those cases, this Court relied upon its prior decision in *Laird* v. *City of Danville*, 225 Va. 256, 302 S.E.2d 21 (1983), where it held invalid city charter and city

code provisions that delegated to the city planning commission the authority to rezone property. In *Laird*, this Court explained that:

> Under Va. Code § 15.1-486, the zoning of property is accomplished when the "governing body" of a county or municipality "by ordinance" classifies the territory within its jurisdiction. Similarly, under Code § 15.1-491(g), the rezoning of property is accomplished when the "governing body . . . by ordinance" amends the property's zoning classification. In each instance, the term "governing body" identifies the board of supervisors in a county, or the municipal council in a city or town, as the entity which alone has the authority to legislate "by ordinance" in a particular locality.

Laird, 225 Va. at 261, 302 S.E.2d at 24. Unlike those zoning cases, the General Assembly, itself, has exercised its power and authority to specify the Regional Taxes and Fees under Chapter 896 and retains ultimate control over them; it has not relinquished such discretion to private parties or administrative staff and remains free to amend or repeal the taxes at any time.[9]

The Marshall appellants string cite several cases, claiming that this Court "has invalidated governmental actions on the basis of fundamental constitutional principles that are not explicitly set forth in the Constitution itself." Marshall Br. 8 n.1. In fact, the primary case they cite, *Whitlock v. Hawkins*, 105 Va. 242, 53 S.E. 401 (1906), highlights this Court's caution when it considers departing from the express provisions of the Constitution. There, the Court considered retrospective legislation and held "that when we depart from the express limitations of the Constitution, and venture into the vast and unexplored region of implied restrictions, the legislative usurpation ought to be very clear, palpable, and oppressive to justify the interposition of the judiciary." *Id.* at 249, 53 S.E. at 403 (quotations and citations omitted). Moreover, in

[9] This Court has pending a case in which parties asserted similar nondelegation claims in the context of the power of the Commonwealth to authorize another special unit of government, the Metropolitan Washington Airports Authority, to impose tolls for the Dulles Parkway in Northern Virginia. *Gray v. Virginia Secretary of Transp.*, Record No. 071220 (Va. Sept. 5, 2007), *petition for rehearing filed* (Va. Sept. 18, 2007), *rehearing granted* (Va. Nov. 9, 2007).

many of the cases the Court did not rely upon implied constitutional restrictions, and, instead, cited explicit terms contained in the Constitution upon which it based the decision. *City of Norfolk v. Chamberlain*, 89 Va. 196, 223, 16 S.E. 730, 738 (1892) (local assessment *explicitly* violated the Constitution; Court noted "the most emphatic terms" of the former Article X, Section 1); *Commonwealth v. City of Newport News*, 158 Va. 521, 164 S.E. 689 (1932) (*explicit* Constitutional provision relating to the use of tidal waters); *Blair v. Marye*, 80 Va. 485 (1885) (citing *explicit* provisions of former Article VI, Section 8 relative to the power of the General Assembly to withhold the salary of the Attorney General).[10]

Wise County Board of Supervisors v. Wilson, 250 Va. 482, 463 S.E.2d 650 (1995), another case heavily relied upon by appellants, Marshall Br. 9, 11, is inapposite. There, this Court considered the question whether the Wise County Board of Supervisors or the County's Commissioner of Revenue had sole authority in Wise County to set the assessment ratio for computing the merchant's capital tax under Va. Code § 58.1-3509. The Court held that the Board of Supervisors had such authority because, in part, if the law were otherwise, the Board's ability to levy taxes under Article VII would be constrained. *Wilson* did not address the power of the General Assembly to give taxing power to an authority, nor did it hold that taxes may be levied only by local governing bodies.

B. Articles IV and VII Are Limited And Do Not Prevent The General Assembly From Adopting Chapter 896's Taxing Procedure.

The Marshall appellants also wrongly claim that Article IV, Section 11 of the Virginia Constitution, which concerns the requirements for the General Assembly's enactment of laws, and Article VII, Sections 1, 2, and 7, all of which concern counties, cities, towns and regional

[10] The other cases cited, *Cochran v. Fairfax County Bd. of Zoning Appeals*, 267 Va. 756, 594 S.E.2d 571 (2004), and *Chapel v. Commonwealth*, 197 Va. 406, 89 S.E. 2d 337 (1955), address whether delegations of legislative powers provided sufficient standards for the administrative officials to follow. As discussed *supra*, pp.14-16, the General Assembly prescribed for NVTA a narrow standard to impose a set of specific, fixed taxes and fees.

governments, exclude the possibility of creating other units of government with taxing authority. Marshall Br. 12-15. As stated in Section 14 of Article IV, however, the rule of construction, *expressio unius est exclusio alterius*, does not apply to the power of the General Assembly. Howard at 538. The constitutional provisions cited by the Marshall appellants are limited in scope and do not prevent the taxing procedure adopted in Chapter 896.

For example, Article VII, Section 7 of the Virginia Constitution provides, in part:

> No ordinance or resolution *appropriating* money . . . , imposing *taxes*, or authorizing the *borrowing* of money shall be passed except by a recorded affirmative vote of a majority of all members elected to the governing body.

(Emphases added.) Appellants would construe this provision to require that any governing body with taxing power must be "elected" by the people. Such a limited interpretation is inconsistent with decades of practice because hundreds of governing bodies, not elected directly by the people, appropriate money and/or borrow money. If Article VII, Section 7 prevents NVTA from imposing taxes, then every authority created pursuant to Title 15.2, Title 21 and Title 36 of the Code of Virginia which has borrowed money or appropriated it has acted unlawfully, including those whose bonds have been validated by this or lower courts.[11] *See, e.g., Dykes v. Northern Va. Transp. Dist. Comm'n*, 242 Va. 357, 411 S.E.2d 1 (1991) (opinion on rehearing beginning at 242 Va. 370 (Nov. 8, 1991)). When read in context with other provisions of Article VII, it is clear that the phrase "elected to the governing body," as used in Section 7, is a limited reference to the governing body of local governments, and is not applicable to representatives of any other entity.

Mr. Howard confirms that the listing in Article VII of "counties, cities, towns and regional governments" is not an exclusive listing of government entities because "[a]nother unit

[11] For a representative list of such entities, NVTA incorporates its brief in opposition to the County of Loudoun's appeal in Record No. 071979.

of government, not expressly provided for in the Constitution, is the special district. This is usually a single-purpose unit of government, created to perform a specific task." Howard at 783. While Mr. Howard suggests that special districts often do not possess the power of taxation, *id.*, he further points out that sanitary districts are a special district form of government, not mentioned in the Constitution, which do have taxing power. *Id.* at 798-800. *See* Va. Code §§ 21-118(6). The citizens of a sanitary district do not elect the board of directors of the sanitary district; rather, the board of supervisors of the county, typically a much larger unit of government embracing many more citizens, is designated to serve as the governing body of the sanitary district. Thus, in Virginia, there is a long-standing, well-recognized practice of having special districts, with limited powers including the power of taxation, whose citizens do not directly elect those persons exercising the power of taxation. The 1970 Constitution allowed sanitary districts to continue.

Section 3 of Article VII also confirms that the General Assembly has the power to create "other unit[s] of government" separate and apart from any county, city or town. That section provides in pertinent part:

> The General Assembly may provide by general law or special act that any county, city, town, or *other unit of government* may exercise any of its powers or perform any of its functions and *may participate in the financing thereof* jointly or in cooperation . . . .

Va. Const. art. VII, § 3 (emphases added). The lack of limitation regarding the "other unit of government" is a clear acknowledgment of the unlimited nature of the General Assembly's power on the subject of creating a special district to perform limited functions. Furthermore, by referring to financing "its functions," the Constitution plainly contemplates "other units" with the power to raise revenue, that is, the power to tax.

The Marshall appellants claim that the imposition of taxes by a body not directly elected by the members of the district contradicts principles of political accountability. Marshall Br. 11. Their concern is unfounded. The members of the General Assembly, who voted to designate the Regional Taxes and Fees, are politically accountable, as is the NVTA Board, because twelve of the fourteen voting members are elected officials, accountable to their constituents. Va. Code § 15.2-4832. Indeed, the NVTA Act requires NVTA's Board decisions be by an affirmative vote of two-thirds of its members present, and such votes must reflect members whose localities include at least two-thirds of the population embraced by NVTA. Va. Code § 15.2-4834. These voting requirements further ensure political accountability.

The Supreme Court of the United States' decision in *Heald v. District of Columbia*, 259 U.S. 114 (1922), directly undermines the Marshall appellants' claim. There, that Court considered whether an act of Congress imposing an intangible property tax on persons residing within the District of Columbia violated the federal Constitution because it subjected District residents to taxation without representation. The Court acknowledged that District residents lacked suffrage, but held that "the objection is not sound. There is no constitutional provision which so limits the power of Congress that taxes can be imposed only upon those who have political representation." *Id.* at 124. Indeed, the Court has repeatedly rejected claims to the contrary. *Thomas v. Gay*, 169 U.S. 264, 277 (1898) (approving Oklahoma's personal property tax imposed on non-residents); *Loughborough v. Blake*, 18 U.S. (5 Wheat) 317 (1820) (Marshall, C.J.) (Congress has power to lay and collect taxes within the District of Columbia). *See also Breakefield v. District of Columbia*, 442 F.2d 1227 (D.C. Cir. 1970) (same), *cert. denied*, 401 U.S. 909 (1971).

Heald is particularly instructive because it applied the federal Constitution, which, unlike the Virginia Constitution, is a *grant* of power. Va. Const. art. IV, § 14; Howard at 537. Accordingly, if the federal Constitution permits taxation of persons who did not elect the body imposing such taxes, certainly the Virginia Constitution, which reflects the plenary power of the General Assembly and which contains no express provision forbidding or restricting taxation of persons who did not directly elect the members of the governmental body imposing the taxes, also permits such an act.

C. The Bonds, When Issued, Shall Not Be A Debt, Liability Or General Obligation Of The Commonwealth And Article X, Section 9 Does Not Apply.

The Marshall appellants claim erroneously that the proposed bond issue violates Article X, Section 9, by pledging the taxing power of the Commonwealth. Marshall Br. 15-18. This claim directly conflicts with their motion for summary judgment where they asserted that NVTA is not able "to assure the continuation of the authority to impose the taxes and fees granted by the General Assembly in . . . Chapter 896." Marshall Defs.' Mem. Supp. S.J. at 3. Now, they say that Chapter 896 does commit the Commonwealth to do so. Their claim is also a direct attack on this Court's decision in *Dykes v. Northern Virginia Transportation District Comm'n*, 242 Va. at 370, 411 S.E.2d at 8. In any event, their present argument ignores the controlling provisions of Chapter 896 and NVTA's Bond Resolution and Indenture which plainly contradict them.

Article X, Section 9(d) explicitly exempts from its provisions "obligation[s] incurred by the Commonwealth or any institution, agency, or authority thereof if the full faith and credit of the Commonwealth is not pledged or committed to the payment of such obligation." Thus, if the full faith and credit of the Commonwealth is not pledged or committed, "no unconstitutional debt is created." *Baliles v. Mazur*, 224 Va. 462, 471, 297 S.E.2d 695, 699 (1982). Contrary to the Marshall appellants' claim, NVTA is not the Commonwealth. Va. Code § 15.2-4830. It is an

independent authority and political subdivision. *Id.* NVTA's enabling legislation explicitly provides that debt incurred through its Bonds is that of the entity, not of the Commonwealth nor of any other political subdivision. Va. Code §§ 15.2-4519(A)(2), 15.2-4839.

Moreover, the claim that the "negotiable instrument" provisions of the Code transform the bonds into unconstitutional debt is specious. Marshall Br. 21-26. This Court made clear in *Dykes*, 242 Va. at 372-73, 411 S.E.2d at 9-10, that one looks to the specific language of the bond to determine if the full faith and credit is pledged. Here, as in *Dykes*, the language of the statute and the Bond documents reject any suggestion of a pledge of the Commonwealth's full faith and credit or that of any locality. *See, e.g.,* J.A. 43 ("The Bonds shall not be a debt of the Commonwealth or any political subdivision thereof (including any member locality) other than NVTA."). Neither the Bond Resolution nor the Indenture approved by NVTA contains a provision mandating NVTA to collect or maintain a particular level of revenue or to covenant, either on its own behalf or on behalf of the General Assembly, to continue to impose or impose at any particular level the Regional Taxes and Fees which are the central component of the Pledgeable NVTA Revenues. J.A. 39-46; J.A. 51-98.

This Court's decision in *Terry v. Mazur*, 234 Va. 442, 362 S.E.2d 904 (1987), does not suggest that NVTA's debt is debt of the Commonwealth subject to Article X, Section 9. In *Mazur*, the Court held that amendments to the State Revenue Bond Act violated Section 9 when they empowered the Commonwealth Transportation Board to issue revenue bonds secured by revenues derived by specified taxes. The Court relied upon the fact that the revenues were derived from taxes that the Commonwealth *was legally obligated under the amendments to impose and appropriate*. *Mazur*, 234 Va. at 453-55, 362 S.E.2d at 910-11.

In contrast to the situation in *Mazur*, neither Chapter 896 nor the NVTA Bond Resolution or Indenture imposes such an obligation on the Commonwealth or NVTA to impose or collect the Regional Taxes and Fees or to provide any revenue to pay the Bonds. Indeed, the General Assembly is free to repeal the portions of the Act authorizing NVTA's Regional Taxes and Fees, which the Bond Resolution expressly acknowledges. J.A. 43 (NVTA "acknowledges that its authority to impose, collect or apply any or all of the Regional Taxes and Fees and the Regional Tax and Fee Revenues may be eliminated, changed or limited at any time by action of the General Assembly . . . ."). *See Mazur*, 234 Va. at 451, 362 S.E.2d at 909 (citing cases). *Mazur* is also inapplicable because it involved the Commonwealth itself, not a special purpose authority like NVTA. NVTA is not the Commonwealth.

The Marshall appellants cite inapplicable authority that the General Assembly is prohibited from doing indirectly what it cannot do directly, Marshall Br. 15-17, and they cite prior referenda in 1990 and 1998 in which voters did not approve proposed constitutional amendments authorizing new categories of state or local debt secured by specific taxes. Marshall Br. 19-20. *Dykes*, decided just one year after the defeat of the 1990 referendum, refutes any suggestion that the General Assembly cannot authorize a political subdivision to issue bonds when the full faith and credit of the Commonwealth and its counties is not pledged.

Moreover, Chapter 896 is distinguishable from the 1990 proposed constitutional amendments. If approved, they would have authorized the Commonwealth and Virginia localities to *obligate* themselves to impose specified taxes to pay the debt service on bonds issued for transportation purposes without having to comply with present constitutional limitations. 1990 Va. Acts of Assembly, chs. 881, 882. Chapter 896 does not do so. Despite the

Marshall appellants' attempts to suggest otherwise, the debt authorized by NVTA does not obligate the Commonwealth to impose taxes or appropriate state funds for the bond payments.

The Marshall appellants contend that rejection of the proposed 1998 amendments to the Constitution demonstrates that the establishment of NVTA is contrary to the intent of the voters. Marshall Br. 16. Examination of the 1998 proposals, however, demonstrates that those regional proposals were in fact far *more* ambitious than Chapter 896. The 1998 proposed amendments, related, in part, to Article VII, Sections 2 and 10, and would have allowed two or more localities to establish a special governing body for an area within the participating localities' borders with powers that "may include *any power* granted to any of the participating localities pursuant to general law or special act." 1998 Va. Acts of Assembly, ch. 387 (emphasis added). Thus, the 1998 proposals potentially could have allowed for the establishment of regional, general governments that had *all the combined powers* of the participating localities, without satisfying the referenda requirement of Article VII that would otherwise apply to the creation of a regional government. Clearly then, the 1998 proposals were *more* expansive than the establishment of NVTA, which is a special purpose authority with limited powers related to the furtherance of transportation initiatives, and for which the General Assembly has specified specific taxes and dictated how such revenue may be spent. Because the 1998 proposals had the potential to create such a regional super-government, it is understandable why voters rejected them. That rejection, however, does not support the Marshall appellants' assertion that the establishment of NVTA is unconstitutional or even contrary to voter intent.

In sum, Chapter 896 does not create debt of the Commonwealth in contravention of the proscriptions of Article X, Section 9 of the Constitution.[12]

[12] For the reasons explained *supra*, Article VII, Section 10, which refers to the pledging of taxing power of the counties also does not apply to NVTA, and Chapter 896 does not create unlawful debt under that provision.

D. The UCC Does Not Proscribe the Bonds.

The Marshall appellants erroneously claim that the NVTA Act requires NVTA's Bonds to meet the negotiable instrument criteria specified in Va. Code § 8.3A-104, which is a provision of the Uniform Commercial Code ("UCC"). Marshall Br. at 21-27. The trial court was correct in rejecting the Marshall appellants' eleventh hour claim.

First, the Marshall appellants did not plead this claim in their counterclaim as to NVTA's Bonds. Instead, they raised the negotiable instrument argument in Count 7 of their counterclaim, which pertains only to their challenge to that portion of Chapter 896 which authorizes new Commonwealth Transportation Board bonds, and not NVTA's Bonds. The Marshall appellants first raised this issue as to NVTA's Bonds in their reply brief in support of their motion for summary judgment. This claim is barred for the reasons set forth by this Court in *Jenkins v. Bay House Associates, L.P.*, 266 Va. 39, 43, 581 S.E.2d 510, 512 (2003), for not having been raised in their defenses or counterclaims as to NVTA's Bonds.

In their opening brief, the Marshall appellants concede that the issue was not raised in their counterclaim as to NVTA. Marshall Br. 27-28. They contend, however, that raising it on the eve of trial is sufficient. As this Court opined in *Jenkins*, "[a] litigant's pleadings are as essential as his proof, and a court may not award particular relief unless it is substantially in accord with the case asserted in those pleadings." 266 Va. at 43, 581 S.E.2d at 512. NVTA was entitled to be told "in plain and explicit language by [the Marshall appellants] what is [their] ground of complaint or defense." *Id.* (quotations and citation omitted). Here, the Marshall appellants filed pleadings styled as counterclaims against NVTA. They did not raise the issue of the negotiability of NVTA's Bonds.

Second, the provisions of Va. Code § 15.2-4519(B)(1) trump the definition of "negotiable instruments" found in the general UCC statutes. That section is part of the Transportation District Act of 1964, which authorized the creation of transportation districts. The Transportation District Act authorizes those districts to issue bonds, which necessarily will be non-recourse or limited obligation bonds, and the General Assembly has explicitly specified that such bonds *are* negotiable instruments. Va. Code § 15.2-4519(B)(1). Under settled principles of statutory construction, the more specific statute prevails over the more general. *E.g., Virginia Nat'l Bank v. Harris*, 220 Va. 336, 257 S.E.2d 867 (1979).

Here, the General Assembly has directed that the statutory provisions of the Transportation District Act of 1964 are incorporated by reference in the NVTA Act and apply to NVTA's Bonds. Va. Code § 15.2-4839. Those specific provisions prevail over more general provisions contained in the UCC governing other commercial transactions.

Third, there is no requirement in Va. Code § 15.2-4519(B)(1) that the Bonds conform to the requirements of the UCC. Indeed, Va. Code § 15.2-4519(B)(1) specifies that the issuer "shall determine the form of the bonds" and they shall be issued "under such terms as the [issuer] fixes . . ." Whatever the form or terms, they shall be negotiable instruments. Va. Code § 15.2-4519(B)(1).

Fourth, even assuming, *arguendo*, the UCC applies in connection with NVTA's Bonds, the definition the Marshall appellants rely upon in Va. Code § 8.3A-104 is expressly modified by Va. Code § 8.3A-106. Otherwise, if one accepts the Marshall appellants' interpretation, non-recourse instruments would not be negotiable. That is not the law, however.

Section 8.3A-106 now states that a promise is *not* made conditional "because payment is limited to resort to a particular fund or source." Va. Code § 8.3A-106(b)(ii). This section was

revised in 1992 to expand an earlier version of the UCC which recognized that government bonds payable from a particular source or proceeds (non-recourse bonds) were not deemed conditional. The 1992 revision expanded the earlier governmental exception and made it applicable to private entities as well. *See id.* Official Comment. The Official Comment to the statute explains that this amendment revised and expanded the former Code Section [§ 3-105(2)(b)] because

> [t]here is no cogent reason why the general credit of a legal entity must be pledged to have a negotiable instrument. Market forces determine the marketability of an instrument of this kind. If potential buyers don't want promises or orders that are payable only from a particular source or fund, they won't take them . . . .

The Marshall appellants have not cited a single case holding that government bonds secured only by a pledge of particular revenue are non-negotiable. Instead, they string cite cases addressing whether private promissory notes are nonnegotiable when they rely upon a separate instrument. Marshall Br. 26. To the extent that they are now contesting the negotiability of NVTA's Bonds based upon a supposed reference to other documents, this was not presented to the trial court and should not be considered. *See* Va. Sup. Ct. R. 5:25; *Manassas Autocars, Inc. v. Couch*, 274 Va. 82, 89 n.3, 645 S.E.2d 443, 446 n.3 (2007). Moreover, they presented no evidence to the trial court supporting such a claim. In any event, the cases they cite simply do not apply to government bonds, and Va. Code § 8.3A-106(b)(ii) controls.

The Marshall appellants' final UCC claim was also not presented to the trial court. Marshall Br. 27. They now contend the NVTA Bonds will not satisfy the fixed amount requirement of Va. Code § 8.3A-104, because the General Assembly and NVTA cannot be obligated to impose the Regional Taxes and Fees in the future, a claim inconsistent with their Article X, Section 9 contention. *Id.* They, again, misconstrue the UCC. Virginia Code § 8.3A-

104 requires only that "the sum payable in an instrument must be a fixed amount of money, that is, a sum certain." Fred H. Miller & Alvin C. Harrell, *The Law of Modern Payment Systems and Notes*, para. 2.02[4][a] (2002). In order to meet this requirement, the NVTA Bonds need only explicitly state their amounts within the corners of each bond, and appellants introduced no evidence suggesting that the "fixed amount" requirement will be violated.

E. Chapter 896 Complies with the "One-Object" Rule.

Article IV, Section 12 of the Constitution, entitled "Form of Laws," provides: "No law shall embrace more than one object, which shall be expressed in its title." With respect to appellants' complaint about Chapter 896's title, Marshall Br. at 29, Article IV, Section 12 does not require that the title of a bill index or digest each provision of the act. *Southern Ry. v. Russell*, 133 Va. 292, 298, 112 S.E. 700, 702 (1922). As described by Mr. Howard, "the title of an act may be general and cover seemingly diverse points if it gives notice of the general subject and interest likely to be affected." Howard at 529. Here, the title gave notice that the subject was transportation. Nothing more was required.

With respect to appellants' attempt to list provisions in Chapter 896 which they contend are not related to transportation, they incorrectly claim that the test is whether each portion of a bill has a "'necessary' and 'natural' connection" *with each other*. Marshall Br. at 32. That is wrong. This Court has stated that "matters *germane to the object, made manifest by its title*, may be included. Those things are germane which are allied, relative or appropriate." *Commonwealth v. Dodson*, 176 Va. 281, 305, 11 S.E.2d 120, 131 (1940)(emphasis added). This Court has held:

> "The fact that many things of a diverse nature are authorized or required to be done in the body of the act, though not expressed in its title, is not objectionable, if what is authorized by the act is germane to the object expressed in the title, or has a legitimate and natural association therewith, or is congruous therewith, the title is sufficient."

Id. (quoting *Town of Narrows v. Bd. of Supervisors v. Giles County*, 128 Va. 572, 582-83, 105 S.E. 82, 85 (1920)).

Thus, the relation of diverse subjects in a bill *to its title* is the standard, not, as the Marshall appellants posit, the relationship of the diverse subjects within a bill to each other. Indeed, if the Marshall appellants' interpretation were correct, the General Assembly could never adopt recodifications of an entire Title in the Code where the "provisions and conditions are too numerous to catalogue." *Dodson*, 176 Va. at 306, 11 S.E.2d at 132. Under the appellants' test, each appropriations bill adopted by the General Assembly would be hopelessly unconstitutional.

This Court's decision in *Board of Supervisors of Fairfax County v. American Trailer Co.*, 193 Va. 72, 68 S.E.2d 115 (1951), which is one of only two cases to set aside legislation for violation of the requirement of Article IV, Section 12 in over half a century, does not compel a different result. In *American Trailer*, the statute's title identified regulatory measures for trailer parks but the challenged provision provided for local taxation of trailer parks. In contrast to the statutes challenged in *American Trailer*, the title of Chapter 896 and its purpose make it clear that the enactment, in its entirety, "relat[es] to transportation." Moreover, contrary to the Marshall appellants' assertion, there is no requirement that each of the enactment clauses be catalogued in the title, and each is plainly a measure "allied, relative or appropriate" to the transportation provisions adopted in Chapter 896. No more is required.

As to the one-object portion of the requirement, here, appellants introduced no evidence of any of the types of abuses described in Mr. Howard's *Commentaries*. Howard at 528; Marshall Br. 31. Moreover, the Marshall appellants' listing of various items in Chapter 896, which they claim are unrelated to transportation, Marshall Br. 32, 35-37, lifts them out of context. For example, the amendment relating to the Virginia Truck and Ornamental Research

Station (J.A. 1004) was necessary because it is funded, in part, by the gas tax and it was necessary to conform the old statute pertaining to the Ornamental Research Station to reflect the increase Chapter 896 made in that tax. For ease of reference, NVTA provides the attached table of the items relied upon by the Marshall appellants, demonstrating how each item is germane to transportation. *See* Addendum attached (containing list of items submitted to the trial court as part of NVTA's submissions below). When read in context, each of the items is plainly related to transportation. *Id.*

CONCLUSION

After many years, the General Assembly has crafted a transportation plan to give some relief across the Commonwealth and more in-depth relief in Northern Virginia and Hampton Roads where traffic stifles economic growth and places a heavy burden on the quality of life. Chapter 896, as it relates to NVTA, may not be perfect, but that is not the test. It is not the function of the judiciary to pass upon the wisdom of legislation or its political feasibility. *E.g.*, *City of Newport News v. Elizabeth City County*, 189 Va. 825, 831, 55 S.E.2d 56, 60 (1949).

A Court's duty under the Public Finance Act is limited to determining whether the bonds and related documents are valid, that is whether they meet the requirements of the Constitution of Virginia. As this Court has repeatedly stated, an act of the General Assembly is presumed to be constitutional and may be set aside only if its provisions plainly and clearly violate the Constitution. Any doubt must be resolved in favor of its constitutionality. Moreover, as this Court has previously stated:

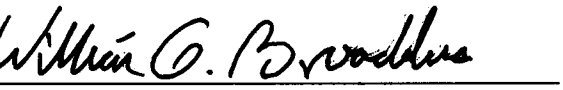
> The passage of an act by the legislature is a solemn declaration and affirmance by that branch of government of its constitutional power to enact the legislation, and its unconstitutionality must plainly appear before a court can declare it void.

Avery v. Beale, 195 Va. 690, 701, 80 S.E.2d 584, 590 (1954) (citations and quotations omitted). Here, NVTA respectfully submits there is no evidence and no basis for finding that the presumptions of constitutionality have been breached or that the General Assembly's declaration falls short of its constitutional prerogative.

For the reasons described above, NVTA submits that the trial court's determination was correct — the General Assembly has acted within the scope of its power. Accordingly, NVTA urges this Court to affirm the trial court, Final Order of August 31, 2007, so that NVTA may proceed with its statutory mandate.

Respectfully submitted,

Northern Virginia Transportation Authority

By: 
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CERTIFICATE OF SERVICE

I hereby certify Rule 5:26(d) has been complied with and that on the 18th day of December, 2007, twenty (20) copies of the foregoing Brief were filed with the Clerk's Office of the Supreme Court of Virginia, a duplicate electronic version of the Brief was emailed to scvbriefs@courts.state.va.us, and three (3) copies were mailed, first class, postage prepaid to the following counsel of record:

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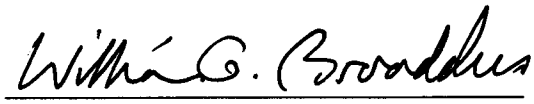

ADDENDUM

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Marshall Parties' trial court mem.	Item Listed By Marshall Parties	Ch. 896 section	Relation to transportation
p.9	"Funding salaries of Va Tech professors"	§ 58.1-2289(C) (2000 & 2007 amendment)	Provision cited is pre-existing in § 58.1-2289(C), which is part of the Virginia Fuel Tax Act. 2000 Va. Acts of Assembly ch. 729 Chapter 896's amendment is necessary to conform to corresponding change to the amount of fuel tax on diesel, which is collected for transportation purposes. See Va. Code § 58.1-2217(B)
p.9	"Funding the Va. Truck and Ornamentals Research Station"	*See* § 58.1-2289(C) (2000 & 2007 amendment)	Same as above.
p.9	Joint Commission on Transportation Accountability	§§ 30-278 to -282 [codified as §§ 30-282 to -286]	Established specifically for legislative oversight of transportation.
p.9	"Mandating civil remedial fees"	*See* § 46.2-206.1 (new) [but § 206 is DMV's disposition of fees]	Civil remedial fees described in § 46.2-206.1 & Notes to this section explain how funds to be used "for transportation purposes." The fees may also reduce bad driving and reduce the number of accidents which contribute substantially to congestion.
p.9	Urban development areas in local comprehensive plans	§ 15.2-2223.1 (new)	Statute specifies that "To the extent possible, state and local transportation . . . funding shall be directed to the urban development area." *See* Va. Code § 15.2-2223.1(G). Incorporation of such new urbanism concepts encourages more intensive, denser development, which may reduce traffic on main arteries and thereby congestion.
p.9-10	Impact fees on new development	*See* § 15.2-2317 to -2329 (1989 and amendments)	Road "[i]mpact fees" are addressed in §§ 15.2-2317-2327, where it is defined as "a charge or assessment imposed against new development in order to generate revenue to fund or recover the costs of reasonable road improvements benefiting the new

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			development." Those impact fees are all related to road improvements. Impact Fees in Article 9, §§ 15.2-2328 & 2329, apply to any locality that has established an urban **transportation** service district . . . ." (Emphasis added.)
p. 9-10	"Dedicating revenues from a statewide tax increase to the Va. Agricultural Foundation"	§ 58.1-2289(C) (2000 & 2007)	Same as funding Va. Tech Professors, above. Provision cited is pre-existing in § 58.1-2289(C), which is part of the Virginia Fuel Tax Act. 2000 Va. Acts of Assembly ch. 729 Chapter 896's amendment is necessary to confirm to corresponding change to the amount of fuel tax on diesel, which is for transportation purposes. See Va. Code § 58.1-2217(B).
p.10	"Acquisition of open space by localities"	Under § 15.2-2329(E) the term open space is included in the definition of public facilities for which impact fees may be used.	Incorporation of such new urbanism concepts encourages more intensive, denser development, which may reduce traffic on main arteries and thereby congestion.
p.11	The title of Chapter 896 does not refer at all to five of those affected titles of the Code: 18.2, 28.2, 29.1, 56, and 62.1.	These titles are referenced, but not changed by ch. 896	No change to these titles under ch. 896